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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. THOMAS ALLEN RICE, Appellant.	)	2 CA-CR 2010-0277 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200800453

Honorable Bradley M. Soos, Judge Pro Tempore

VACATED AND REMANDED FOR RESENTENCING

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Katia Méhu — Phoenix
Attorneys for Appellee

Michael Villarreal — Florence
Attorney for Appellant

E C K E R S T R O M, Judge.

¶1 Thomas Rice appeals from an enhanced, presumptive, 11.25-year prison term imposed after we remanded his case for resentencing. *See State v. Rice*, No. 2 CA-

CR 2009-0108, ¶ 8 (memorandum decision filed Dec. 18, 2009). For the following reasons, we vacate his sentence and remand to the trial court for resentencing.

¶2 On appeal, Rice argues (1) his counsel rendered ineffective assistance at his resentencing hearing, (2) his sentence was excessive and constituted cruel and unusual punishment, and (3) the trial court failed to provide him with an opportunity for allocution at his resentencing. He asks that we again remand his case for resentencing.

¶3 As the state correctly points out, Rice's claim of ineffective assistance of counsel is not properly before us. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20, 153 P.3d 1040, 1044 (2007) (ineffective assistance of counsel may only be raised in post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P.); *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (same; ineffective assistance claim may not be raised on direct appeal). Although the record before us suggests that Rice's counsel failed to investigate and substantiate a potential mitigating circumstance on behalf of Rice, whether that failure constituted deficient performance of counsel, whether it was tactically motivated or whether it prejudiced Rice, are all factual questions more appropriately explored pursuant to Rule 32. We have no record sufficient to consider those questions on appeal and therefore decline to do so. *Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at 527.

¶4 In arguing his sentence was unconstitutional, Rice appears to conflate constitutional standards for cruel and unusual punishment with his allegation that the trial court abused its discretion in failing to investigate or consider evidence in mitigation when imposing sentence. Rice has presented no argument that, as a general matter, a

prison term of 11.25 years is excessive punishment for a burglary committed by an offender with two historical prior felony convictions. *See* A.R.S. § 13-703(C),(J). "A prison sentence is not grossly disproportionate . . . if it arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference.'" *State v. Berger*, 212 Ariz. 473, ¶ 17, 134 P.3d 378, 382 (2006), *quoting Ewing v. California*, 538 U.S. 11, 30 (2003) (O'Connor, J., plurality opinion). Nor does he suggest the sentence was excessive in the context of the particular crime he had committed or the nature of his prior convictions. *See id.* ¶ 39 (sentencing statute "that does not violate the Eighth Amendment in its general application may still, in its application to 'the specific facts and circumstances' of a defendant's offense, result in an unconstitutionally disproportionate sentence"), *quoting State v. Davis*, 206 Ariz. 377, ¶ 32, 79 P.3d 64, 71 (2003). Because Rice has not developed the argument that his sentence was cruel and unusual in a manner that permits meaningful review, we do not consider it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶5 Rice claims the trial court abused its discretion when it declined to consider, as a mitigating circumstance at sentencing, his attorney's statement that Rice had rendered life-saving assistance to prison officials during his post-conviction incarceration. According to Rice, the court "fail[ed] to conduct an adequate investigation into the relevant facts" supporting counsel's assertion by either requesting corroborative evidence or affording Rice an opportunity to personally elaborate on the circumstances. He maintains that, as a result, his sentence was arbitrary or capricious and must be vacated. We disagree.

¶6 "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). Relying on *State v. Williams*, 131 Ariz. 411, 641 P.2d 899 (App. 1982), and *State v. Gannon*, 130 Ariz. 592, 638 P.2d 206 (1981), Rice maintains a court abuses its discretion at sentencing when it fails "to conduct an adequate investigation into the relevant facts." However, the court already had continued Rice's resentencing hearing to afford counsel an opportunity to investigate and corroborate his claim in mitigation, but no evidence was presented beyond counsel's avowal. Although a court must conduct sufficient investigation of facts to permit the "intelligent exercise of [its] sentencing power," *Gannon*, 130 Ariz. at 594, 638 P.2d at 208, we are aware of no authority requiring a court to conduct an independent investigation of a defendant's assertions or, sua sponte, to direct that counsel do so. *Cf. State v. Eagle*, 196 Ariz. 188, ¶ 17, 994 P.2d 395, 399 (2000) ("Because the defendant alone benefits from the presence of mitigating circumstances, it is proper to place the burden of proving them on the defense."). We find no abuse of discretion in the court's declining to consider counsel's assertion, standing alone, as a mitigating circumstance. *See Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357 ("[A] sentencing court is not required to find that mitigating circumstances exist merely because mitigating evidence is presented.").

¶7 Finally, Rice argues that he is entitled to be resentenced because the trial court denied his right to allocution. He maintains that, had he been afforded an

opportunity to address the court before he was resentenced, he "could easily have expounded on his cooperation with the prison officials and on his belief that this act constituted mitigating evidence" in support of a reduced sentence. We agree that the trial court erred in denying Rice his right to speak on his own behalf and that he is entitled to a resentencing for that reason.

¶8 Pursuant to Rule 26.10(b)(1), Ariz. R. Crim. P., a trial court "shall . . . [g]ive the defendant an opportunity to speak on his or her own behalf" before imposing sentence. The purpose of allocution "is to allow the defendant to make a mitigating statement for the judge to consider in determining the sentence." *State v. McCall*, 160 Ariz. 119, 124, 770 P.2d 1165, 1170 (1989). Here, the record is clear that the court failed to provide Rice an opportunity to personally address the court.

¶9 The state correctly observes that a trial court's failure to comply with Rule 26.10(b)(1) does not necessarily require resentencing. "Even when a defendant is denied a chance to speak before sentencing, 'there is no need for resentencing unless the defendant can show that he would have added something to the mitigating evidence already presented.'" *State v. Anderson*, 210 Ariz. 327, ¶ 100, 111 P.3d 369, 392 (2005), *quoting State v. Hinchey*, 181 Ariz. 307, 313, 890 P.2d 602, 608 (1995). However, Rice asserts that he could have provided the court more detailed information substantiating that he had given assistance to prison officials that had saved a life. Because the court could have viewed such cooperation as potentially mitigating and because the court found that, in the absence of such mitigation, the aggravating and mitigating factors balanced each other, we cannot conclude that the court's failure to provide Rice an opportunity to

speak was harmless beyond a reasonable doubt.[1] *See State v. Munninger*, 209 Ariz. 473, ¶ 13, 104 P.3d 204, 209 (App. 2005) ("Sentencing error is harmless only if we can say with certainty that the same sentence would have obtained if the error had not occurred."), *abrogated on other grounds by State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005). We therefore remand this case for a resentencing at which Rice shall have the opportunity to speak on his own behalf in conformity with the requirements of Ariz. R. Crim. P. 26.10(b)(1).

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[1]The state argues that this claim was not preserved before the trial court and we should therefore review only for fundamental error. We do not agree. *See State v. Vermuele*, 226 Ariz. 399, ¶¶6, 14, 249 P.3d 1099, 1101, 1103 (App. 2011) (sentencing claim not waived when sentencing error not apparent until trial court has begun rendition of sentence).